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Mark Langer
Clerk of the U.S. Court of Appeals
District of Columbia Circuit
E. Barrett Prettyman Courthouse
333 Constitution Ave NW
Washington, DC 20001

Re: *Blassingame v. Trump*, No. 22-5069 (consolidated with Nos. 22-7030, 22-7031)

Dear Mr. Langer:

We write in response to Appellant Trump's July 17, 2023 letter.

Counterman is irrelevant here for multiple reasons. First, the principles reflected in *Nixon v. Fitzgerald* and separation-of-powers doctrine—not the scope of the First Amendment—dictate affirmance of the district court's decision rejecting absolute immunity. *See* Appellees.Suppl.Br.2-7.

Second, even accepting that the scope of the First Amendment is a guide to assessing immunity, it is a guide only by "analog[y]." U.S.Suppl.Br.17; *see id.* at 19 (similar). The view of the United States is that no immunity exists where the President's "speech encouraged imminent private violent action and was likely to produce such action." *Id.* at 2. *Counterman*'s discussion of the nitty-gritty details of First Amendment doctrine does not dictate the exact contours of a test for presidential immunity, let alone say anything about the Supreme Court's views on that topic.

Third, *Counterman* does not alter the First Amendment standard for incitement. *Counterman* involved true threats, not incitement, and discussed existing incitement authorities only to support the conclusion that liability for true threats must involve *some* mens rea requirement. *See* 143 S. Ct. at 2117 (stating that the standard for incitement "*presumably* requires purpose or knowledge" (emphasis added)). The Court's only holding is that the mens rea required for true-threats liability is recklessness, *see id.* at 2111-12—a holding that has no bearing on this case.

Finally, even if the "purpose or knowledge" standard for incitement discussed in *Counterman* were relevant here, the district court has already correctly determined that the complaints' allegations satisfy that standard. *Counterman* makes clear that "knowledge" includes "aware[ness] that [a] result is practically certain to follow." 143 S. Ct. at 2117. The district court explained that it was "reasonable to infer that [Trump] would have known that some in the audience were prepared for violence" and that he "would have known that some supporters viewed" his words "as a call to action." *Thompson v. Trump*, 590 F. Supp. 3d 46, 115-17 (D.D.C.

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2022); *see* U.S.Suppl.Br.20. That is more than sufficient to demonstrate “purpose or knowledge” to “produce imminent disorder.” 143 S. Ct. at 2115, 2118.

Sincerely,

/s/ Donald B. Verrilli, Jr.

Donald B. Verrilli, Jr.

DBV